Supreme Court, U.S.
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No. 91-2012

In the Supreme Court of the United States

OCTOBER TERM, 1992

JACKIE HOLDER, ET AL., PETITIONERS

v.

REV. E. K. HALL, SR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the practice of electing a single county commissioner may be invalidated as dilutive under Section 2 of the Voting Rights Act of 1969, 42 U.S.C. 1973.

2. Whether the court of appeals applied the correct legal standard in finding that racially polarized voting had been demonstrated.

3. Whether the court of appeals should have remanded the issue of racial polarization to the district court rather than deciding that issue itself.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Since its creation in 1912, Bleckley County, Georgia, has had a sole-commissioner form of government. Pet. App. 4. The commissioner has exclusive legislative and executive power, and is elected by a majority vote of all voters in the county. *Id.* at 65; see Ga. Code Ann. § 36-5-22.1 (Michie 1987). In 1985, a referendum on adopting a multimember-commission form of government for Bleckley County was defeated. Pet. App. 9; see 1985 Ga. Laws 4406.

The voting age population in Bleckley County is 19% black and 80% white. Voter registration levels for blacks

and whites are about 70% for each group. Pet. App. 64-65. No black has ever run for the office of county commissioner. *Id.* at 78.

2. In 1985, respondents filed suit in federal district court against Bleckley County's commissioner and its superintendent of elections (petitioners herein). Pet. App. 66. Respondents alleged that Bleckley County's practice of electing a sole commissioner violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. Pet. App. 66.

After a bench trial, the district court found for petitioners. Pet. App. 2-61. Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the district court found that respondents could satisfy the first *Gingles* precondition—*i.e.*, the requirement that the plaintiff group be sufficiently numerous to constitute a majority of a single-member district—if the number of county commissioners were increased to six. Pet. App. 12, 55.

The court found, however, that respondents had failed to satisfy the second and third *Gingles* preconditions. Pet. App. 33-55. In reaching that conclusion, the court held that "plaintiffs may not rely upon socio-economic or other barriers as specific evidence that voting in the community is racially polarized." *Id.* at 50. Instead, the court indicated that statistical evidence of actual voting behavior "is *all* the court has or can have" to support a finding of racial polarization. *Ibid.*; see also *id.* at 51 & n.45.

The court noted that respondents had not produced such evidence for local elections. Pet. App. 33. While respondents had offered statistical data on the 1984 and 1988 Presidential primaries involving Jesse Jackson, the court found that evidence insufficient to prove a pattern of polarized voting. *Id.* at 37-46, 50-51. The court therefore concluded that respondents had failed to satisfy the third *Gingles* precondition—that whites usually vote sufficiently as a bloc to defeat the minority's preferred candidate. *Id.* at 51.

For essentially the same reasons, the court found that respondents had also failed to satisfy the second *Gingles* precondition, *i.e.*, that blacks are politically cohesive. Pet. App. 52-55. The court concluded that respondents' failure to establish two of the *Gingles* preconditions was fatal to their Section 2 claim. Pet. App. 55-56.

Nonetheless, the court went to consider other factors relevant to the totality of the circumstances under Section 2. In particular, it found that "Bleckley County's black community yet suffers the indignities associated with a proportionally poorer socio-economic status" (Pet. App. 58), and that this status "hinders the ability of blacks to participate in the Bleckley County political process," particularly in light of "the fact that Bleckley County now has only one voting precinct for the entire 219 square-mile area." *Id.* at 7 & n.3. The court also found that "[t]here appear also to have been problems in the past with regard to low black representation among workers at the election polling place." *Id.* at 53.

On the other hand, the court found that "there is no [candidate] slating process to stand as a barrier to minority participation." Pet. App. 59. The court also found that respondents had failed to prove that the single-commissioner form of government was unresponsive to minority voters or that the policy underlying it was "tenuous." *Ibid.* Under the totality of the circumstances, the court concluded that respondents' claims "must fail." *Id.* at 59-60.[1]

3. The court of appeals reversed. Pet. App. 62-86. Relying on its prior decision in *Carrollton Branch of NAACP* v. *Stallings*, 829 F.2d 1547 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988), the court held that a challenge to the practice of electing a sole commissioner

[1] The district court also rejected respondents' constitutional claims, finding no evidence that the practice of electing a sole commissioner had been adopted or maintained with discriminatory intent. Pet. App. 23-28.

is "subject to the same analysis" as that employed in *Gingles*. Pet. App. 68. Applying this analysis, the court agreed with the district court that respondents had satisfied the first *Gingles* precondition by showing that blacks could constitute a majority of the electorate in one of five single-member districts. *Id.* at 74 & n.10. The court explained that it is "appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive." *Id.* at 74.

The court further held that the district court had been "operating under a misconception of the law" when it found that respondents had failed to establish racially polarized voting. Pet. App. 76. The court explained that it is appropriate to consider a wide variety of evidence in addition to statistical electoral data in determining whether there is racially polarized voting. *Id.* at 77. After considering all of the relevant evidence, including the inability of blacks to sponsor a candidate for commissioner, the available statistical and electoral data, the testimony of black political leaders, the fact that a significant number of Bleckley County voters had supported segregationist candidates in the past, the county's history of enforced racial segregation, and the district judge's observation that "[h]aving run for public office myself, I'll guarantee you, under the circumstances, I wouldn't run if I were black in [Bleckley] county" (*id.* at 79), the court of appeals found that the evidence "conclusively" established both white bloc voting and minority political cohesiveness. *Id.* at 78-85 & n.18; see also *id.* at 64 n.2. Accordingly, the court reversed the district court's contrary findings as clearly erroneous. *Id.* at 85.

Turning to the totality of the circumstances, the court of appeals concluded that "the totality of the circumstances found in Bleckley County clearly reveal[s] a situation where the electoral power of Bleckley County

blacks has been abridged 'on account of race or color.'" Pet. App. 86. Accordingly, the court held that respondents had proved a violation of Section 2.[2]

DISCUSSION

1. Petitioners are correct in contending (Pet. 22) that "[t]he Voting Rights Act of 1965 does not empower the courts to subdivide a jurisdiction to ensure proportional representation." More generally, in our view, the Section 2 results test is not violated by a well-settled practice of electing only one official to an office in a particular geographical area.

a. Section 2 provides that "[n]o * * * standard, practice, or procedure shall be imposed or applied * * * in a manner which results in a denial or abridgement of the right * * * to vote on account of race or color." 42 U.S.C. 1973(a). The practice of electing a single official to an office in a particular geographic area—*i.e.*, the use of a true "single-member office"—is clearly a "standard, practice, or procedure" within the meaning of Section 2, and thus elections to such offices are within the coverage of Section 2.

The fact that Section 2 applies to cases involving single-member offices does not mean, however, that the practice of utilizing such offices may be invalidated on the ground that it results in vote dilution. Section 2 requires only that the existing political processes be "equally open to participation by members of" all racial groups. 42 U.S.C. 1973(b). The Section 2 results test is violated only if the challenged electoral practice operates to deny a racial group its right to vote "on account of race or color" by causing that group to have "less opportunity than other members of the electorate to participate

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[2] Having found a violation of Section 2, the court of appeals did not reach respondents' constitutional claims. Pet. App. 68 n.6.

in the political process and to elect representatives of their choice." 42 U.S.C. 1973(a) and (b).[3]

The practice of electing only one official to an office in a particular geographic region does not deprive any minority racial group of an equal opportunity to participate and elect "on account of race or color"; under the single-member office structure of government, it is the group's small size, not its race, that prevents it from achieving a greater measure of electoral success. To be sure, the practice of electing only one official from a particular area may mean that minority groups—whether racial, religious, political, or socio-economic—will be unable to achieve electoral success, but that does not mean that they are being unfairly denied an equal opportunity to participate in the political process. It is inherent in the very nature of our majoritarian democratic political system that numerical minorities lose elections, and Section 2 was not intended to invalidate that democratic system. See *Whitcomb* v. *Chavis*, 403 U.S. 124, 153-155 (1971).[4] Accordingly, the practice of utilizing a single-

[3] The requirement that a denial or abridgement of the right to vote be "on account of race or color" appears in subsection (a) of Section 2, while the results test itself is set forth in subsection (b). It is clear, however, that the results test invalidates only those electoral practices that result in a denial of equal political opportunity "on account of race or color" (or, in the case of language minorities, "because" of the plaintiff's membership in a language minority, 42 U.S.C. 1973b(f)(2)).

[4] *Whitcomb* v. *Chavis* was decided before the enactment of the Section 2 results test, and it involved a claim of vote dilution under the Constitution rather than under Section 2. Nonetheless, it is controlling with respect to the proper interpretation of Section 2 as well, because Congress clearly intended to adopt the standards enunciated in *Whitcomb*, *White* v. *Regester*, 412 U.S. 755 (1973), and similar cases when it amended Section 2 in 1982. See S. Rep. No. 417, 97th Cong., 1st Sess. 20-21, 22-23, 32 (1982) [hereinafter *Senate Report*]; see also *Thornburg* v. *Gingles*, 478 U.S. 30, 97 (1986) (O'Connor, J., concurring in judgment).

member office does not violate Section 2, because it does not result in the denial of equal political opportunity on account of race.

b. Absent unusual circumstances, moreover, a construction of Section 2 that permitted federal courts to mandate an increase in the number of officials elected to an office for the purpose of enhancing the electoral power of particular racial groups would be impermissible for another reason as well: it would run afoul of Congress's decree that "nothing in this section [2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b). To explain why that is so, it is necessary to consider the standards generally applicable to vote dilution claims under Section 2.

In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court announced three preconditions applicable to claims that the use of an at-large districting scheme results in vote dilution in violation of Section 2.[5] Those preconditions require a plaintiff group to demonstrate that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

In her opinion concurring in the judgment in *Gingles*, Justice O'Connor demonstrated that the majority's test

[5] *Gingles* applied its preconditions to all claims that at-large electoral schemes deny plaintiffs an equal opportunity to *elect* representatives, but left open the questions whether Section 2 permits a claim that plaintiffs have been denied an equal opportunity to *influence* election results and, if so, what standards are applicable to such a claim. 478 U.S. at 46 n.12. For the reasons set forth in our briefs *amicus curiae* in *Growe* v. *Emison*, No. 91-1420, at 8-12, and *Voinovich* v. *Quilter*, No. 91-1618, at 15-16 & n.9, we believe that the three *Gingles* preconditions are applicable to so-called "influence" claims as well.

would, if construed to require a finding of a violation merely upon proof of the three preconditions set forth above,[6] create "what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups." 478 U.S. at 91 (O'Connor, J., concurring in judgment). As she explained, the majority's test would therefore "come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2." *Id.* at 94.[7]

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[6] In our view, proof of the *Gingles* preconditions is not in itself sufficient to make out a claim of vote dilution; plaintiffs must also offer evidence of the totality of the circumstances in order to prove a violation of Section 2. See U.S. Br. *amicus curiae* in *Growe* v. *Emison*, No. 91-1420, at 8; see also 42 U.S.C. 1973(b) (violation of results test established only if "it is shown" "based on the totality of circumstances"); *Senate Report* 27 ("*Plaintiffs * * * must show* that the challenged system or practice, *in the context of all the circumstances* in the jurisdiction in question, results in minorities being denied equal access to the political process.") (emphasis added). The lower courts, however, are divided over the question whether plaintiffs must offer any evidence beyond proof of the three *Gingles* preconditions. Compare, *e.g.*, Pet. App. 73 & n.9; *Concerned Citizens* v. *Hardee County Bd.*, 906 F.2d 524, 526 (11th Cir. 1990); *Solomon* v. *Liberty County*, 899 F.2d 1012, 1017, 1035 (11th Cir. 1990) (en banc) (concurring opinions), cert. denied, 111 S. Ct. 670 (1991); with, *e.g.*, *East Jefferson Coalition* v. *Parish of Jefferson*, 926 F.2d 487, 491 (5th Cir. 1991); *Monroe* v. *City of Woodville*, 881 F.2d 1327, 1330 (5th Cir. 1989); *Jeffers* v. *Clinton*, 730 F. Supp. 196, 209 (E.D. Ark. 1989), aff'd, 111 S. Ct. 662 (1991).

[7] We agree with Justice O'Connor that permitting proof of the three *Gingles* preconditions alone to establish a violation of Section 2 would be inconsistent with Congress's rejection of a proportional representation regime. That is particularly true if the *Gingles* plurality's definition of racially polarized voting, which permits a finding of racial polarization even where factors other than race account for the appearance of polarized voting, were to be accepted. See 478 U.S. at 61-74 (opinion of Brennan, J.). A number of lower courts have accepted that definition, further increasing the likelihood that Section 2 will in effect be applied to require roughly proportional representation. See, *e.g.*, *Carrollton Branch of NAACP* v. *Stallings*, 829 F.2d at 1557-1558; *Solomon* v. *Liberty County*, 899 F.2d at 1035 n.12 (Tjoflat, J., specially concurring); *Campos* v. *City of Baytown*, 696 F. Supp. 1128, 1136 (S.D. Tex. 1987), aff'd in pertinent part on other grounds, 840 F.2d 1240 (5th Cir. 1988); *NcNeil* v. *City of Springfield*, 658 F. Supp. 1015, 1019 (C.D. Ill. 1987), mandamus denied, appeal dismissed, 818 F.2d 565 (7th Cir. 1987); cf. *Collins* v. *City of Norfolk*, 816 F.2d 932, 935-936 (4th Cir. 1987); *Overton* v. *City of Austin*, 871 F.2d 529, 538 n.9 (5th Cir. 1989). We continue to believe that defendants should be permitted to show that factors other than race explain an apparent pattern of white bloc voting. See generally U.S. Br. *amicus curiae* in *Thornburg* v. *Gingles*, No. 83-1968, at 30 n.57. That question was left open in *Gingles*. See 478 U.S. at 100 (O'Connor, J., concurring in judgment); *id.* at 82 (White, J., concurring).

It is readily apparent that the court of appeals' reasoning in this case, if expanded beyond its narrow context, would exacerbate even further the problems identified by Justice O'Connor in her *Gingles* concurrence. Under the court of appeals' logic, plaintiffs could effectively nullify the first *Gingles* precondition by claiming that the defendant jurisdiction's practice of electing too few officials to the particular office at issue was responsible for the plaintiff group's inability to form a majority in a single-member district. For example, if the plaintiff group sought to challenge a city's practice of electing its five council members at large, but the plaintiff group was not sufficiently large or geographically compact to constitute a majority in one of five single-member council districts, the plaintiffs could simply claim that the city's failure to elect seven—or ten, or fifty—council members was a dilutive "practice" in violation of Section 2.[8]

[8] To be sure, the court of appeals in this case expanded the number of officials elected to a single-member office rather than the number of members of a multimember body, but the court did not expressly limit its rationale to the single-member office context. See Pet. App. 74. In any event, there is no principled basis under Section 2 for limiting claims of this type to the context of single-member offices; if plaintiff groups are entitled to have five county

If the first *Gingles* precondition could be automatically evaded in that manner, it would cease to have any meaning at all. See *Romero* v. *City of Pomona*, 883 F.2d 1418, 1425 n.10 (9th Cir. 1989). The result would be that plaintiff groups could prove a violation of Section 2 merely by showing that they were politically cohesive—as is frequently the case—and that their preferred candidates usually lost elections.[9] Short of an express requirement of proportional representation, it is difficult to imagine a clearer violation of Congress's command that "nothing in this section [2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b).

c. Even if there were any remaining doubt about the proper construction of Section 2, this Court's decision in *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991), would counsel against a construction of the statute that requires state and local jurisdictions to increase the number of officials elected to particular offices in order to enhance the voting power of particular racial groups. In *Gregory*, the Court held that it would not "attribute to Congress an intent to intrude on state governmental functions" in the absence of a "plain statement" of congressional intent to achieve that result. 111 S. Ct. at 2406. Although it is clear that Congress intended Section 2 to invalidate a wide variety of electoral devices where those devices operate to deny racial groups equal access to the political process, there is no evidence whatsoever of any con-

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commissioners rather than one where that would enable them to achieve electoral success, why are they not equally entitled to have ten commissioners rather than five in order to achieve that same result?

[9] Such a showing would suffice at least in those courts that do not require plaintiffs to prove anything beyond the *Gingles* preconditions in order to make out a Section 2 violation and that do not permit defendants to rebut a prima facie showing of racially polarized voting by proving that factors other than race explain the appearance of polarization. See notes 6, 7, *supra*.

gressional intention to intrude still further into state and local government structures and require changes in the number of office-holders elected to a particular office. Moreover, in *Minnesota State Senate* v. *Beens*, 406 U.S. 187, 196-200 (1972), this Court rejected the proposition that the equitable powers of a federal court were sufficiently broad to require a major change in the size of a state legislative body even as a remedy for a *constitutional* violation. *Beens* made clear that, in general, "[s]ize is for the State to determine," *id.* at 200, and Congress did not purport to overturn that judgment when it amended Section 2 in 1982.

A broad interpretation of the decision below would call into question the practice of electing single state governors and attorneys general, city mayors, county sheriffs, coroners, and prosecutors, and a wide variety of other officers in jurisdictions in which there is racially polarized voting. It would no doubt be possible for defendants in some of those cases to defend successfully against a Section 2 challenge by showing that the governmental interest in maintaining the existing system outweighed the plaintiffs' showing of vote dilution. See, *e.g.*, *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 111 S. Ct. 2376, 2381 (1991); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976); *Senate Report* 29. But the government's interest in preserving a particular challenged practice will not invariably outweigh a showing of dilution (*Houston Lawyers*, 111 S. Ct. at 2381), and thus it is likely that a significant number of these existing single-member offices would be restructured into multimember bodies as a result of (or in order to avoid the risks and expense of) voting rights litigation. Nothing in the language or legislative history of Section 2 suggests that Congress intended such a result.

d. Respondents err in contending (Br. in Opp. 11-12) that *Houston Lawyers' Ass'n* v. *Attorney General of*

Texas, 111 S. Ct. 2376 (1991), supports the conclusion that courts may increase the size of governmental bodies. *Houston Lawyers* was not a true single-member office case at all. Rather, it involved a traditional challenge to an at-large multimember electoral scheme—in particular, the at-large election of multiple county judges on a county-wide (or wider) basis, *with each judicial electoral district electing more than one judge*. *Id.* at 2378-2379. Thus, the single-member office principle provided no defense under those circumstances, because that principle, properly understood, "only applies to a narrow category of elected offices: ones for which the electoral district cannot be subdivided because only one official is elected from a geographic region." U.S. Br. *amicus curiae* in *Houston Lawyers*, Nos. 90-813 and 90-974, at 15; see generally *id.* at 12-17. *Houston Lawyers* thus provided no opportunity for the Court to consider whether Section 2 permits federal courts to increase the number of officials elected to an office in order to enhance the electoral power of a particular racial group, and it did not even purport to decide that question.[10] Accordingly, *Houston Lawyers* sheds no light on the question at issue in this case.[11]

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[10] Indeed, *Houston Lawyers* did not even purport to decide whether the electoral scheme before it was invalid under Section 2. The only question before the Court in that case was whether Section 2 "applies to the election of trial judges in Texas" (111 S. Ct. at 2378) even though judgeships may be characterized as "single-member offices" in the sense that judges exercise independent decision-making authority. *Id.* at 2380. As noted above, the judgeships at issue in Texas were not true single-member offices because each judicial district elected multiple judges through at-large voting. Moreover, as we explained in our brief in *Houston Lawyers*, each judge "ha[d] the same authority and exercise[d] the same responsibility," and "each district court within each county is interchangeable with every other office." 90-813 & 90-974 U.S. Amicus Br. at 15-16.

[11] This Court's decisions under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, also do not undermine the conclusion that the practice of electing one official to a particular office is not itself a

e. At least one other court of appeals has reached the conclusion that single-member offices cannot be challenged under the Section 2 results test, albeit it in a different context. In *Butts* v. *City of New York*, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986), plaintiffs challenged a New York law requiring run-off primary elections if no candidate received 40% of the vote for mayor and other citywide single-member offices. The court held that the challenged law did not improperly dilute the votes of minorities because dilution principles governing elections to multimember bodies do not apply to single-member offices, in which "[t]here can be no equal opportunity for representation within an office filled by one person." 779 F.2d at 148. When elections are held for a multimember body, a minority group has the opportunity to secure "a share of representation" equal to that of other groups by electing members from districts in which the minority is dominant. But because "there is no such thing as a 'share' of a single-member

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violation of the Section 2 results test. To be sure, the Court has held that changes in the size of a legislative body constitute changes in a "standard, practice, or procedure" with respect to voting for purposes of Section 5. See *Lockhart* v. *United States*, 460 U.S. 125, 131 (1983); see also *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 828 (1992). But the inquiry under Section 5 is quite distinct from that under the Section 2 results test; Section 5 looks to whether the challenged change has the "purpose" or will have the "effect" of denying or abridging the right to vote on account of race. 42 U.S.C. 1973c. The "effects" prong of Section 5 requires that a proposed change in election laws not lead to a "retrogression" in the electoral strength of a particular racial group. *Lockhart* v. *United States*, 460 U.S. 125, 134 n.10 (1983); *Beer* v. *United States*, 425 U.S. 130, 141 (1976). But retrogression alone does not suffice to establish a violation of Section 2. See *Senate Report* 68 n.224; see generally U.S. Br. *amicus curiae*, in *Thornburg* v. *Gingles*, No. 83-1968 at 17 n.39. Thus, while a change in the number of officials elected to an office from a particular geographic area may violate the "purpose" or "effect" prong of Section 5 (or for that matter the intent prong of Section 2), it generally will not violate the results test.

office," the Second Circuit stated, vote dilution theory cannot be applied to such offices. *Ibid.*[12]

There is also tension between the decision below and the decisions of other courts of appeals in cases involving challenges to multimember bodies. A number of courts have expressly rejected the proposition that the size of multimember bodies may be increased where necessary in order to permit plaintiff groups to satisfy the first *Gingles* precondition. See *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 946-947 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989); *Romero* v. *City of Pomona*, 883 F.2d at 1425 n.10; see also *Overton* v. *City of Austin*, 871 F.2d 529, 543 (5th Cir. 1989) (Jones, J., concurring).

Nonetheless, we do not believe that further review of this issue is warranted at this time. In the first place, the decision below arises in an unusual context—a single county commissioner who exercises total legislative and executive power over an entire county—and it is too early to say whether the Eleventh Circuit will apply the reasoning of the decision below beyond its context in a manner that creates a direct conflict with the decisions of other circuits. Indeed, there is reason to believe that the decision below may be limited to its facts: the Eleventh Circuit has previously implied that traditional single-member executive offices would be immune from challenge under Section 2 even though single-member offices that combine executive and legislative power may be successfully challenged. *Dillard* v. *Crenshaw County*, 831 F.2d 246, 251 (11th Cir. 1987). If the Eleventh Circuit were to adopt such a rule, it would minimize the extent of the

[12] In *Butts*, the court of appeals held that a plurality vote requirement for a single-member office was not subject to Section 2 challenge. 779 F.2d at 151. In our view, the *method* of electing candidates to a single-member office is not immune to attack; hurdles to success other than the single-member structure may be challenged in appropriate cases.

circuit conflict and limit the significance of this case to a few counties in Georgia.[13]

Moreover, this case does not provide a desirable vehicle for addressing the full range of legal issues raised by the single-member office issue. Petitioners apparently did not raise most of the legal arguments discussed above in the lower courts, nor do they raise them in their petition. Instead, petitioners focus primarily on their contention that the court of appeals erred in increasing the size of the county commission "to ensure proportional minority representation." Pet. 9; see Pet. 12, 21, 22-23. As we explained above, it is true that the reasoning of the court of appeals, if extended beyond its narrow context, would likely amount to a requirement of roughly proportional representation, but the court certainly did not expressly apply such a requirement, as petitioners contend. Thus, even if this Court were to accept petitioners' preferred legal standard and remand to the court of appeals for application of that legal standard to the facts of this case, the court of appeals might well reach the same result.

This Court has already denied a petition for a writ of certiorari in a case presenting precisely the same question at issue here. See *Carrollton Branch of NAACP* v. *Stallings*, 829 F.2d 1547 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988). Under the circumstances, we see no reason for the Court to adopt a different course in this case.

2. Petitioners also contend that the court of appeals erred in its treatment of the issue of racially polarized voting. Pet. 13-22. That contention does not warrant this Court's review.

[13] Outside of Georgia, there are no counties in the United States that have sole county commissioners; all have multimember bodies of one sort or another. *1987 Census of Governments*, Vol. 1, No. 2: Government Organization; Popularly Elected Officials [GC87(1)-2] (January 1990). According to petitioners, only 17 of the 159 counties in Georgia elect a sole commissioner. Pet. 3.

a. The court of appeals properly concluded that non-statistical evidence is relevant in deciding whether there is racially polarized voting. To be sure, when statistical evidence of voting patterns is available, it usually provides the best indication of whether the minority group is politically cohesive and whether the majority usually votes sufficiently as a bloc to defeat the minority's preferred candidate. Courts are not limited to considering statistical evidence in deciding these critical issues, however.

In this case, the relevant local elections were not susceptible of regression analysis because they were held in a single precinct. Pet. App. 25, 33 n.22. The only election that could be analyzed statistically was the 1984 presidential primary involving Jesse Jackson, and exit polling data were available only for the 1988 presidential primary. *Id.* at 75-76, 78 n.12. Both courts below agreed that the evidence from these elections was insufficient to determine whether voting patterns in Bleckley County are racially polarized. *Id.* at 76. In these circumstances, the court of appeals was clearly correct in concluding that respondents could rely on non-statistical evidence to show that voting in Bleckley County is polarized.

Gingles itself makes this clear. In that case, this Court stated that "the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." 478 U.S. at 57 n.25. In such cases, "courts must rely on other factors that tend to prove unequal access to the electoral process." *Ibid.*

b. Petitioners contend, however, that none of the evidence cited by the court of appeals is probative of racially polarized voting. Pet. 16-19. That contention is without merit. All the evidence discussed by the court of appeals was relevant to the question whether voting in Bleckley County is racially polarized. See Fed. R. Evid. 401.

The evidence that no black candidate has ever run for commissioner is one such relevant factor. Pet. App. 78.

That circumstance is more likely to exist in a community in which there is polarized voting than in one in which there is not. See *McMillan* v. *Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984). Similarly, the court properly deemed relevant testimony from black political leaders that it would be futile for a black candidate to run. Pet. App. 78-79. The observations of those who participate directly in the political process and have leadership experience can be relevant in determining whether voting is racially polarized. *Sanchez* v. *Bond*, 875 F.2d 1488, 1493-1494 (10th Cir. 1989), cert. denied, 111 S. Ct. 340 (1990); *Carrollton Branch of NAACP* v. *Stallings*, 829 F.2d at 1558. In *Gingles* itself, the district court's finding of polarized voting, although based primarily on statistical evidence, was "supplemented to some degree by the testimony of lay witnesses." 478 U.S. at 41.

Another relevant circumstance is that black candidates have consistently lost local elections when whites have constituted a majority of the electorate, but have won when blacks have been in the majority. Pet. App. 81. As petitioners suggest, it is theoretically possible that black and white voters preferred the same candidates in these elections. Pet. 18. A factfinder could reasonably conclude, however, that this pattern is further evidence that black voters in Bleckley County generally prefer black candidates, while white voters generally prefer white candidates. *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1567 n.34 (11th Cir. 1984); *Nevitt* v. *Sides*, 571 F.2d 209, 223 n.18 (5th Cir. 1978); *Lodge* v. *Buxton*, 639 F.2d 1358, 1378 (5th Cir. 1981), aff'd, 458 U.S. 613 (1982).

It is also of some relevance that candidates for state and national office who ran on racist themes received significant support in Bleckley County. Pet. App. 82. Petitioners argue that it is impossible to know whether the support for these candidates came from whites or blacks. Pet. 18. But surely a court may infer that a candidate

who has espoused white supremacy is more likely to have received his support from white voters than from black voters.

Finally, the history of discrimination in Bleckley County is also pertinent here. Pet. App. 82-84. Polarized voting is more likely to be found in a community in which there has been a history of discrimination than in one in which there has been no such history. *Marengo County*, 731 F.2d at 1567 n.34; *Nevett*, 571 F.2d at 223 n.18.

3. Petitioners contend (Pet. 21-22) that if the district court applied an improper standard in deciding the issue of polarization and failed to consider all the relevant evidence, the court of appeals should have remanded to the district court rather than deciding the issue itself. Pet. 21-22. In *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982), this Court held that once a court of appeals identifies a legal error in the district court's approach to a factual issue, it should generally remand to the district court to decide that issue under the proper legal standard. A court of appeals may decide the issue itself, however, when "the record permits only one resolution of the factual issue." *Id.* at 292.

The court of appeals applied that standard here. It resolved the polarization issue itself only after determining that "the evidence conclusively establishes a pattern of racially polarized voting in Bleckley County." Pet. App. 84-85. That fact-intensive determination affects only the parties to this case, and does not raise a question of broader significance. Accordingly, the court of appeals' fact-bound decision to resolve the issue of racial polarization rather than remand it to the district court does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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